PUBLIC BANK BHD v. T SIVAM THARAMALINGAM

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: J-02 (NCVC) (W)-1729-10-2015]
1 JANUARY 2017

LAND LAW: *Indefeasibility of title and interest – Void instrument – Son fraudulently transferred father's land to himself and charged it to bank – Whether bank had knowledge of purported fraudulent or improper acquisition of land – Whether bank acquired subsequent interest in land as registered chargee in good faith and for valuable consideration – Whether charge arose from void instrument – Whether charge defeasible and liable to be set aside – National Land Code, s. 340(2)(a) & (3)*

LAND LAW: *Charge – Validity of – Fraudulent or void instrument of transfer – Son fraudulently transferred father's land to himself and charged it to bank – Whether bank bona fide registered chargee for value without notice – Whether charge defeasible – Whether charge arose from void instrument and liable to be set aside – Whether bank had knowledge of purported fraudulent or improper acquisition of land – Whether bank acquired subsequent interest in land – National Land Code, s. 340(2)(a) & (3)*

The deceased was the proprietor of a piece of land ('the land'). In 2006, the deceased's son ('Nagarajan') transferred the land to himself and charged it to the appellant ('the defendant') as security for a loan. The deceased instituted a civil suit ('suit 2007') against Nagarajan at the High Court, alleging that the said transfer of land was by fraudulent means. The High Court held in favour of the deceased. Nagarajan's appeal against the decision of the High Court at the Court of Appeal and the Federal Court proved futile. Before his death, the deceased notified the defendant on the invalidity of the transfer of the land to Nagarajan and requested the defendant to discharge the charge and return the issue document of title of the land. However, this was not complied with by the defendant until the deceased's death. In 2013, the respondent ('the plaintiff'), in his capacity as the administrator of the estate of the deceased filed an action at the High Court seeking, *inter alia*, for a declaration that the charge in favour of the defendant was defeasible and liable to be set aside ('suit 78'). The High Court allowed the reliefs prayed for by the plaintiff. Hence, the present appeal by the defendant. In support of its appeal, the defendant maintained (i) that it had no knowledge of the purported fraudulent or improper acquisition of the land; and (ii) the charge, which was executed in its favour, was indefeasible as the defendant had acquired a subsequent interest in the land as a registered chargee in good faith

A and for valuable consideration. Hence, the proviso to s. 340(3) of the National Land Code ('the NLC') was applicable to the defendant despite the transfer to Nagarajan having been allegedly obtained by fraudulent means. The plaintiff argued that (i) the deceased had obtained a declaratoty order *vide* suit 2007 that the transfer of the land to Nagarajan from the deceased was B invalid; (ii) Nagarajan's title of the land was defeated pursuant to s. 340(2)(a) of the NLC; and (iii) a search at the Land Office would have revealed a letter allegedly informing that there were objections from the deceased's children regarding the transfer of the land to Nagarajan ('the letter'). The primary issue that arose for the court's adjudication was whether the charge executed C by Nagarajan, which was registered in favour of the defendant, arose from a void instrument and was therefore liable to be set aside.

Held (allowing appeal; setting aside order of High Court with costs)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

D **(1)** It was the judgment of the judge in suit 2007 that the deceased executed the transfer under the mistaken belief that the execution was to transfer the land to all his children, including Nagarajan. Little did he know that the execution was to Nagarajan alone. Therefore, the instrument of transfer from the deceased to Nagarajan was signed and validly executed by the deceased except that it was by fraudulent means. However, suit E 2007 did not set aside the charge which was executed in favour of the defendant as the charge was never an issue in suit 2007. (paras 27-28)

(2) A perusal of the letter showed that it was not addressed to the defendant. Neither was there evidence to prove that the letter was ever received by the defendant. The defendant could not have had knowledge of the F letter. In addition, it was not for the defendant to peruse through all the correspondences in the land office files before proceeding to register the charge. In any event, there was no evidence to show that the defendant had knowledge of the dispute between Nagarajan and the deceased at the time or the exchanges between the lawyers when the charge was G executed. (paras 32 & 41)

(3) The defendant was not aware of any dispute between the family. Suit 2007 was not filed yet at that point of time. In addition, the judgment in Suit 2007 was only obtained in 2011, which was four years after the charge was registered and the loan was disbursed. One could not impute H knowledge of fraud of solicitor as being knowledge of the client. Even if the defendant's security documentation lawyer could be said to have had some knowledge of the allegations of fraud, such knowledge could not be imputed to the defendant. (paras 42 & 43)

I

(4) The land was already registered in Nagarajan's name at the point in time when the charge was registered. Although the title to the land which was acquired by Nagarajan was defeasible and liable to be set aside pursuant to s. 340(2)(a) of the NLC, the defendant's registered charge remained valid and indefeasible pursuant to the proviso to s. 340(3) of the same. The term in the proviso to s. 340(3) of the NLC is not limited to persons who acquired the land but also includes, *inter alia*, lessees and chargees. The proviso provides protection to subsequent holders of title or interest who had acquired such title or interest in good faith and for valuable consideration. The defendant, as the chargee, was a *bona fide* acquirer of a subsequent interest in the land for valuable consideration and who had no notice of the alleged fraudulent transfer of the land to Nagarajan. Therefore, the defendant was entitled to the protection of the proviso to s. 340(3) of the NLC. (paras 33, 53, 54, 55 & 63)

Bahasa Malaysia *Headnotes*

Si mati adalah pemilik sebidang tanah ('tanah tersebut'). Pada 2006, anak lelaki si mati ('Nagarajan') memindah milik tanah tersebut kepada dirinya dan memajakkannya pada perayu ('defendan') sebagai cagaran bagi satu pinjaman. Si mati memulakan guaman sivil ('guaman 2007') terhadap Nagarajan di Mahkamah Tinggi dengan dakwaan pindah milik tanah tersebut dilakukan secara penipuan. Mahkamah Tinggi memutuskan berpihak pada si mati. Rayuan Nagarajan terhadap keputusan Mahkamah Tinggi di Mahkamah Rayuan dan Mahkamah Persekutuan tidak berjaya. Sebelum meninggal dunia, si mati memaklumkan defendan akan ketaksahan pindah milik tanah kepada Nagarajan dan memohon agar defendan melepaskan pajakan dan memulangkan dokumen hak milik keluaran tanah tersebut. Walau bagaimanapun, ini tidak dipatuhi oleh defendan hinggalah si mati meninggal dunia. Pada 2013, responden ('plaintif'), dalam kapasitinya sebagai pentadbir estet si mati, memfailkan satu tindakan di Mahkamah Tinggi memohon, antara lain, satu perisytiharan bahawa pajakan pada defendan boleh disangkal dan boleh diketepikan ('guaman 78'). Mahkamah Tinggi membenarkan relif-relif yang dipohon oleh plaintif. Maka timbul rayuan ini oleh defendan. Menyokong rayuannya, defendan menghujahkan (i) tidak tahu tentang penipuan yang didakwa atau ketakaturan pengambilan tanah tersebut; dan (ii) pajakan tersebut, yang dilaksanakan buatnya, tidak boleh disangkal kerana defendan memperoleh kepentingan terkemudian atas tanah sebagai pemajak berdaftar suci hati dan bagi balasan bernilai. Oleh itu, proviso s. 340(3) Kanun Tanah Negara ('KTN') terpakai pada defendan walaupun pindah milik kepada Nagarajan dikatakan dilakukan secara penipuan. Plaintif mendalihkan (i) si mati memperoleh perintah perisytiharan dalam guaman 2007 bahawa pindah milik tanah kepada Nagarajan daripada si mati tidak sah; (ii) hak milik Nagarajan atas tanah

terhapus berikutan s. 340(2)(a) KTN; dan (iii) carian di Pejabat Tanah mendedahkan satu surat yang kononnya memaklumkan bantahan oleh anak-anak si mati terhadap pindah milik tanah kepada Nagarajan ('surat tersebut'). Isu utama yang berbangkit bagi pemutusan mahkamah adalah sama ada pajakan yang dilaksanakan oleh Nagarajan, yang didaftarkan pada defendan, terhasil daripada instrumen terbatal dan dengan itu boleh diketepikan.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi dengan kos)

Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Hakim dalam guaman 2007 memutuskan si mati melaksanakan pindah milik berdasarkan satu salah anggapan yang pelaksanaannya adalah untuk memindah milik kesemua tanah kepada kesemua anak-anaknya, termasuk Nagarajan. Dia tidak tahu pelaksanaan tersebut adalah dibuat untuk Nagarajan seorang. Oleh itu, instrumen pindah milik daripada si mati kepada Nagarajan dilaksanakan dan ditandatangani secara sah oleh si mati tetapi dilakukan secara penipuan. Walau bagaimanapun, guaman 2007 tidak mengetepikan pajakan pada defendan kerana pajakan tersebut bukan isu dalam guaman 2007.

(2) Penelitian surat menunjukkan surat tersebut tidak dialamatkan kepada defendan. Tiada juga keterangan yang membuktikan defendan ada menerima surat ini. Defendan tidak mengetahui mengenai surat tersebut. Tambahan lagi, defendan tidak bertanggungjawab meneliti kesemua surat-menyurat di dalam fail pejabat tanah sebelum mendaftar pajakan. Dalam apa-apa jua keadaan, tiada keterangan untuk menunjukkan defendan tahu tentang perbalahan antara Nagarajan dan si mati pada masa itu atau komunikasi antara peguam-peguam semasa pajakan dilaksanakan.

(3) Defendan tidak tahu tentang perbalahan kekeluargaan yang timbul. Guaman 2007 belum difailkan pada masa itu. Tambahan lagi, penghakiman dalam guaman 2007 hanya diperoleh pada 2011 iaitu empat tahun selepas pajakan didaftarkan dan pinjaman dibayar. Seseorang tidak boleh mengaitkan pengetahuan penipuan oleh peguam cara dengan pengetahuan anak guam. Jika pun peguam dokumentasi defendan boleh dikatakan tahu serba sedikit tentang dakwaan penipuan, pengetahuan ini tidak boleh dikaitkan dengan defendan.

(4) Tanah tersebut telah didaftarkan bawah nama Nagarajan semasa pajakan didaftarkan. Walaupun hak milik tanah yang diperoleh oleh Nagarajan boleh disangkal dan boleh diketepikan bawah s. 340(2)(a) KTN, pajakan berdaftar defendan kekal sah dan tidak boleh disangkal susulan proviso s. 340(3) KTN. Terma dalam proviso s. 340(3) KTN tidak terbatas buat

orang-orang yang memperoleh tanah tersebut tetapi juga termasuk, antara lain, pemajak dan pemegang gadaian. Proviso ini memperuntukkan perlindungan buat pemegang hak milik atau kepentingan yang terkemudian yang memperoleh hak milik atau kepentingan dengan suci hati dan bagi balasan bernilai. Defendan, sebagai pemegang gadaian, adalah pemeroleh *bona fide* kepentingan terkemudian atas tanah bagi balasan bernilai yang tidak tahu tentang penipuan pindah milik kepada Nagarajan. Oleh itu, defendan berhak mendapat perlindungan proviso s. 340(3) KTN.

Case(s) referred to:
Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(dist)***
Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener) [2014] 3 CLJ 869 HC ***(refd)***
Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals [2008] 3 CLJ 692 CA ***(refd)***
State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***
Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
National Land Code, ss. 5, 340(2)(a), (3)

For the appellant - Chan Kok Keong & Samuel Tan; M/s Shook Lin & Bok
For the respondent - S' Prakash, K Navinderan & Satchitanandan; M/s Kamil Hashim Raj & Lim

[Editor's note: Appeal from High Court, Muar; Civil Suit No: 22NCVC-78-2013 (overruled).]

Reported by Najib Tamby

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] This judgment is in respect of an appeal by the appellant (defendant in the court below) against the decision of the High Court Judge of Muar dated 9 September 2015, in allowing the respondent's (plaintiff's in the court below) claim, after a full trial.

[2] Parties will be referred to as they were in the court below.

[3] The defendant is Public Bank Berhad whilst the plaintiff is the representative/executor of the estate of one Nagamuthu a/l Periasamy ("deceased").

A **Background**

[4] At all material times, the deceased was the proprietor/owner of the land held under HM No HS (M) 3612 Lot No. 913, Mukim of Renggam, District of Kluang, Johor (hereinafter referred to as "the land").

B **[5]** On or about 16 May 2006, the deceased's son, Nagarajan a/l Nagamuthu ("Nagarajan") transferred the land to himself under Perserahan No. 1639/2006.

[6] Nagarajan subsequently charged the land to the defendant, pursuant to a letter of offer dated 18 October 2006 and facilities agreement dated C 22 February 2007, whereby the defendant granted a fixed loan of RM100,000 to Nagarajan and one Sithra Velusamy.

[7] A memorandum of charge was duly registered on 26 February 2007 under charge presentation no. 520/2007.

D **[8]** The deceased instituted a civil suit No. 22-77-2007 ("Suit 2007") against Nagarajan at the Muar High Court alleging that the transfer of the land was by fraudulent means. After a full trial, the Muar High Court on 18 October 2011 declared that the transfer of the land to Nagarajan under Perserahan No 1639/2006 was invalid as it was transferred by fraudulent means.

E

[9] Nagarajan appealed to the Court of Appeal on the Muar High Court decision dated 18 October 2011. The Court of Appeal dismissed his appeal and affirmed the Muar High Court's decision on 20 September 2012. He filed a notice of motion to the Federal Court for leave to appeal which was F dismissed on 9 July 2013.

[10] Before the death of the deceased on 14 February 2014, the solicitors of the deceased notified the defendant by a letter dated 17 August 2013 of the orders of the Muar High Court dated 18 October 2011, Court of Appeal dated 20 September 2012 and the Federal Court dated 9 July 2013, regarding G the invalidity of the transfer of the land to Nagarajan. At the same time the defendant was requested to discharge the charge and return the issue document of title of the land to the deceased's solicitors, Messrs. Kamil Hashim Raj & Lim forthwith.

[11] However, the defendant failed, refused to comply with the request of H the solicitors of the deceased.

[12] In October 2013, the administrator of the estate of the deceased, filed a writ, Suit No: 22NCVC-78-2013 and a statement of claim in the Muar High Court against the defendant seeking, *inter alia*, for a declaration that the charge in favour of the defendant is defeasible and liable to be set aside ("Suit I 78"). On 9 September 2015, the Muar High Court allowed the reliefs prayed for, by the respondent.

[13] Dissatisfied with the decision of the Muar High Court dated 9 September 2015, the defendant appealed to the Court of Appeal, which is the present appeal before us. A

The Issue

[14] Primarily the issue to be determined, is whether the charge executed by Nagarajan, which was registered in favour of the defendant arose from a void instrument and is therefore liable to be set aside at the instance of the registered proprietor. B

The Plaintiff's Case

[15] The deceased had obtained a declaratory order dated 18 October 2011 *vide* Suit 2007, that the transfer of the land to Nagarajan from deceased was invalid as it was found that the acquisition of the land by Nagarajan was by fraudulent means. C

[16] Therefore, it was submitted by the plaintiff that Nagarajan's purported title to the land was defeated pursuant to s. 340(2) (a) of the National Land Code as a result of the fraud committed by him. D

[17] The plaintiff relied on the case of *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539 where the Court of Appeal adopted the *nemo dat* rule that a person who has no good title in the land is incapable of passing any title to others. Hence, it was submitted by the plaintiff that the registration of the charge in favour of the defendant by Nagarajan was executed from a void instrument and thus, ought to be set aside. E

[18] The plaintiff further referred to the *ratio* of the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 which was followed in the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 wherein it ruled that the shield under s. 340(3) of the National Land Code, does not apply to the immediate holder of interest of the land. It was submitted on behalf of the plaintiff that, the defendant, after having acquired an interest directly from Nagarajan, who was the fraudster, falls within the definition of an immediate holder of interest on the land. As such, applying the cases of *Tan Ying Hong v. Tan Sian San & Ors and Kamarulzaman Omar & Ors v Yakub Husin & Ors*, the plaintiff submitted that any form of reliance by the defendant on the *bona fide* provision laid down in the sub proviso to s. 340(3) of the National Land Code would be erroneous and liable to be set aside. F G H

[19] The plaintiff was of the view that the facts in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*'s case fall squarely with the facts before us ie, that the defendant falls within the definition of an immediate holder of interest I

on the land. Thus, it was submitted that, consequently, the defendant's interest in the land by virtue of the charge, is defeasible and liable to be set aside in the hands of the defendant.

[20] The plaintiff stated that the judgment of the learned High Court Judge in the present suit was correct when she arrived at a finding that the defendant is an immediate holder of interest in the land. Therefore, it was submitted that, the learned judge's findings that the defendant could not seek protection under s. 340(3) of the National Land Code, was correct and ought not to be disturbed by this court.

The Defendant's Case

[21] The defendant maintained that it had no knowledge of the purported fraudulent or improper acquisition of the land by Nagarajan from the deceased.

[22] The defendant contended that the charge which was executed in its favour is indefeasible as the defendant had acquired a subsequent interest in the land as a registered chargee in good faith and for valuable consideration. Hence, the proviso to s. 340(3) of the National Land Code is applicable to the defendant despite the transfer to Nagarajan having been allegedly obtained by fraudulent means.

Findings

[23] From the chronology of events in the case before us, we take note of the following facts:

a) Suit 2007 was filed after the charge in favour of the appellant was registered;

b) The writ and statement of claim of suit 2007 was dated 20 June 2007;

c) The charge in favour of the defendant was executed on 22 February 2007 and was registered at the Kluang Land Office on 26.2.2007;

d) The writ and statement of claim of Suit 2007 was never served on the defendant and neither was the defendant made a party to the same;

e) The defendant was also never served with the judgment of suit 2007 before 2013. The judgment was only served on the defendant in 2013 *vide* a letter from Messrs. Hashim Pury & Lim which was addressed to the defendant.

[24] The abovesaid facts were never disputed by the plaintiff during the trial.

[25] It is pertinent to note that the judgment in Suit 2007 did not set aside the charge which was executed in favour of the appellant, as the charge was never an issue in suit 2007 at the Muar High Court.

The issue before the Muar High Court as can be gleaned from para. 7 of the grounds of the learned High Court Judge in suit 2007 was, whether Nagarajan effected the transfer of the land by way of fraud.

[26] As for the case before us, the central issue is the charge, and the plaintiff pleaded that the charge is not valid because the transfer from the deceased to Nagarajan was premised on an invalid instrument (refer to para. 11 of the amended reply to the statement of claim).

[27] From the judgment of the learned High Court Judge in suit 2007 (Tab 18 common core bundle vol. 1), it was the finding of the learned High Court Judge that the deceased executed the transfer under the mistaken belief (as represented by Nagarajan to him) that the execution was to transfer the land to all his children, including Nagarajan. Little did he know that at that point in time, the transfer that he executed was to Nagarajan alone. The relevant part of the judgment reads:

> 12.1. saya dapati … Plaintif telah menandatangani dokumen-dokumen tersebut atas tanggapan yang diberi oleh Defendan kepadanya bahawa dokumen-dokumen ini adalah bagi maksud membolehkan pindahmilek hartanah tersebut kepada semua anak-anak Plaintif, termasuk Defendan;
>
> 12.2 jika tidak oleh kerana tanggapan yang salah yang diberi oleh Defendan kepada Plaintif itu., Plaintif tidak mungkin menandatangani dokumen-dokumen tersebut …

[28] Thus, the instrument of transfer from the deceased to Nagarajan was signed and validly executed by the deceased, except that it was by fraudulent means.

[29] The plaintiff further alleged that the defendant is not a *bona fide* purchaser and therefore the proviso to s. 340(3) of the National Land Code does not provide protection to the defendant. The plaintiff alleged that the defendant was negligent in not carrying out a proper search on the land with the Kluang Land Office because if such was done, the defendant would have discovered that:

i) the transfer of the land to Nagarajan was being objected to, by the deceased's children pursuant to a letter dated 29 July 1999;

ii) there were two issue documents of title for the land issued by the Kluang Land Office which contain the same registration date;

iii) a caveat had been lodged by Tharamalingam a/l Nagamuthu (Brother to Nagarajan) on 14 July 2006 over the land before the facility agreement dated 22 February 2007 had been entered between the defendant, Nagarajan and Sithra.

[30] The above allegations by the plaintiff, however, were never pleaded by the plaintiff in his pleadings and hence it is outside the purview of our consideration.

[31] In any event, the allegation by the plaintiff that a search in the Kluang Land Office would have revealed a letter dated 29 July 1999 allegedly informing that there were objections from the deceased's children with regards to the transfer of the land to Nagarajan, has no merits.

[32] A perusal of the letter dated 29 July 1999 showed that it was not addressed to the defendant. Neither was there evidence at trial to prove that the letter was ever received by the defendant. Hence how could the defendant have had knowledge of the letter. In addition, it is not for the defendant to peruse through all the correspondences in the land office files before proceeding to register the charge. That would be an onerous task to impose on the defendant.

[33] From the undisputed facts, the land was already registered in Nagarajan's name at the point in time when the charge was registered on 26 February 2007. The defendant was entitled to rely on the conclusiveness of the records at the land office which showed that Nagarajan is the registered proprietor of the land pursuant to s. 89 of the National Land Code.

[34] On the allegation that there were two issue documents of title for the land issued by the Kluang Land Office which contains the same registration date – we are of the view that these arguments also bear no merit. A perusal of the two titles, discloses one of the titles was dated 22 June 2007 (pp. 40-41 common core bundle vol 1) which showed the deceased as the registered proprietor whilst the other title dated 29 June 2006 (pp. 42-43, common core bundle vol 1) shows that Nagarajan as the registered proprietor.

The land was transferred to Nagarajan on 16 May 2006. Hence, logically and correctly, the title dated 29 June 2009 is the updated version of the title pertaining to the land. There is nothing suspicious or irregular about the two titles as alleged.

[35] The other allegation by the plaintiff to defeat the defendant's claim that it was acting *bona fide* without knowledge of the fraud, is that a caveat had been lodged by Tharamalingam a/l Nagamuthu (Brother to Nagarajan a/l Nagamuthu) on 14 July 2006 over the land before the facility agreement dated 22 February 2007 had been entered into between the defendant, Nagarajan and Sithra. This, according to the plaintiff, should have put the defendant on notice before registering the caveat.

[36] It was pleaded by the plaintiff that the caveat was entered on 13 July 2006 ie, before the facility agreement dated 22 February 2007 was entered into between the defendant and Nagarajan and Sithra.

[37] However, at the time when the defendant's solicitor conducted a land search on 26 February 2007, which was at the time of the drawdown of the loan, the search disclosed that Tharmalingam's caveat was already removed on 21 February 2007. This was before the facility agreement was entered into on 22 February 2007 and before the registration of the charge on 26 February 2007.

[38] It was also alleged by the plaintiff that the defendant knew of the existence of the caveat when the defendant issued the letter of offer of the loan on 18 October 2006. Again, this was not pleaded by the plaintiff and neither was it proven at trial.

[39] Essentially, from the facts, at the point in time when the loan was released and the charge registered on 26 February 2007, the caveat was no longer in existence as it had been removed. In any event, there was no finding by the trial judge that the defendant had knowledge of the caveat at the material time.

[40] Further, cases have shown that mere knowledge of a caveat by itself cannot amount to notice of any fraud or intention of cheating the deceased Nagamuthu. (See *Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals* [2008] 3 CLJ 692; [2008] 5 MLJ 128 at 153 and 155)

[41] In the course of the trial, the plaintiff alleged that the defendant had knowledge of the purported fraud because the security documentation solicitor of the defendant, P. Thirumalai had knowledge of the same through various correspondences and letters between Nagarajan's lawyer and the deceased Nagamuthu's lawyer, where allegations of fraud were made. We note that these facts, correspondences and allegations were never pleaded nor particularised in the pleadings.

In any event, there was no evidence to show that the defendant had knowledge of the dispute between Nagarajan and the deceased at the time, or the exchanges between the lawyers when the charge was executed.

It was in evidence in the examination in chief of Mr. P.Thirumalai (DW2) that, he did not, at any point in time inform the defendant of these letters and correspondences and none were ever forwarded to the defendant. This evidence was not challenged.

[42] In addition, the defendant's branch manager, DW1 confirmed in evidence that the defendant was not aware of any dispute between Nagamuthu/Nagarajan's family at that point in time. It is pertinent to note that, at this point in time, suit 2007 was not filed yet. In addition, the judgment in suit 2007 was only obtained in 2011 ie, four years after the charge was registered and the loan disbursed.

[43] Further, case law has established that one cannot impute knowledge of fraud of a solicitor as being knowledge of the client. Although the general rule is that the knowledge of a solicitor is that of the client, such that it is not open to the client to say that the solicitor did not disclose the true facts to him, an important exception to the general rule, is in cases of fraud. As such even if the defendant's security documentation lawyer can be said to have had some knowledge of the allegations of fraud, such knowledge cannot be imputed to the defendant.

[44] As for the doctrine of constructive notice, it is settled law as specified in [1974] 1 LNS 30; [1975] 1 MLJ 85 at 88 that such a doctrine does not apply to the Torrens system, as that would be accepting the concept of constructive notice of allegations of fraud or lack of good faith which is inapplicable under the Torrens system, where registration is fundamental. The court in *Doshi v. Yeoh Tiong Lay* held that:

> It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent …
>
> But the doctrine of constructive notice, which is all the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the facts of registration.

[45] Hence constructive notice of fraud, (as opposed to actual knowledge) is not acceptable in the instance case. As it stands, there is no evidence of actual knowledge of fraud on the part of the defendant.

[46] Be that as it may, the plaintiff cannot raise such an allegation of fraud or knowledge of the fraud on the part of the defendant, as the same was never pleaded.

[47] The High Court in the present suit, made findings of fact that the appellant had proven that it had no notice of the fraudulent transfer of the land to Nagarajan. The relevant part of the judge's judgment reads:

> (e) Walaupun Defendan telah membuktikan bahawa carian telah dibuat terhadap hakmilik hartanah bagi membuktikan tidak ada notis diserahkan mengenai kewujudan frod dalam pemilikan hartanah oleh Nagarajan a/l Nagamuthu, Defendan masih tidak boleh mengguna pakai proviso di bawah Seskyen 340 Kanun Tanah Negara 1965 memandangkan Gadaian tersebut berdasarkan instrument yang tidak sah dan dengan itu perlu diketepikan …

[48] Despite making such findings of facts, nevertheless, the trial judge went on to make a finding that the defendant could not seek the protection of the proviso of s. 340(3) of the National Land Code, as the defendant was an immediate acquirer of an interest in the land. Consequently, the learned

trial judge held that the charge must be set aside as it was premised on a void instrument of transfer as the transfer from the deceased to Nagarajan was by fraudulent means.

[49] The learned judge premised her decision on *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539, *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 where she was of the view that based on the aforesaid cases, regardless if the acquisition of the land was *bona fide* and for valuable consideration, so long as the transfer was based on a void instrument, then the transfer ought to be set aside. Hence she concluded by saying that:

> Oleh itu, memandangkan instrument yang digunakan oleh Nagarajan a/l Nagamuthu adalah instrument yang tidak sah, maka pinjaman yang dipohon dengan menggadaikan hartanah dengan menggunakan instrument yang tidak sah telah menjadikan gadaian tersebut juga tidak sah.

[50] By this, the learned trial judge had run into error in her findings, when she concluded that the defendant's charge was defeasible as the defendant was an immediate acquirer of an interest in the land and the charge was based on a void instrument of transfer.

[51] The learned trial judge also relied on the judgment in suit 2007 of the Muar High Court. However the findings of the Muar High Court in suit 22-77-2007 were that, the instrument of transfer was signed and executed by the deceased to Nagarajan except that it was tainted with fraud as the transfer was executed under a mistaken belief that the transfer was to be made to certain persons. Hence the situation falls under s. 340(2)(a), not 340(2)(b) of the National Land Code.

[52] It is undisputed that the land was already transferred and registered in Nagarajan's name when the defendant granted the loan to the borrowers (Nagarajan and Sithra). Thus, from the facts, the defendant is not the immediate acquirer of the interest in the land. The defendant, as holder of the charge, was the subsequent holder of interest in the land.

[53] Therefore, although the title to the land which was acquired by Nagarajan under Presentation No. 1639/2006 dated 16 May 2006 was defeasible and liable to be set aside pursuant to s. 340(2)(a) of the National Land Code, the defendant's registered charge remains valid and indefeasible pursuant to the proviso to s. 340(3) of the same.

Section 340 (3) provides that:

> (3) Where the title or interest of any person of any person or body is defeasible by reason of any of the circumstances specified in sub section (2) –
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

A (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

B

[54] The term "purchaser" in the proviso to s. 340(3) of the National Land Code is not limited to persons who acquired the land but would also include, *inter alia*, lessees and chargees.

C **[55]** Section 5 of the National Land Code defines "purchaser" as " a person or body who in good faith and for valuable consideration acquired title to, or any interest in the land. (refer to the case of *Kasai Reiko v. Annie Lee Fong & Ors; Public Bank Bhd (Intervener)* [2014] 3 CLJ 869; [2014] 7 MLJ 652 at p. 673)

D **[56]** The proviso to s. 340(3) of the National Land Code provides protection to subsequent holders of title or interest who had acquired such title or interest in good faith and for valuable consideration.

[57] The term "good faith" and "*bona fide*" has been used interchangeably. E The term "*bona fide* purchaser' was defined in the case of *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 2 MLJ 589 at p. 603 which means:

> The term "*bona fide* purchaser" has been used in a host of cases. Simply put it means a buyer in good faith. And the basic element of good faith is the absence of fraud, *deceit* or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction. But the overwhelming consideration is "the particular circumstances of each case.

F

[58] The Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1, at p. 7, affirmed the position of law that chargee banks that are subsequent holders of interest can avail themselves of the G protection under the proviso of s. 340(3) of the National Land Code.

[59] Despite the finding of fact by the learned trial judge in the present suit that the defendant in this case had no notice of any fraud whatsoever and that the defendant was a *bona fide* purchaser for valuable consideration, nonetheless the learned trial judge fell into error when she failed to appreciate H the legal principle that was enunciated in the case of *Tan Ying Hong v. Tan Sian San & Ors* with regards to deferred indefeasibility.

[60] In *Tan Ying Hong v. Tan Sian San & Ors*, the transfer Form 14A was executed pursuant to a forged power of attorney. In like manner, our case herein is premised upon an invalid memorandum of transfer, whereby I Nagarajan acquired title to the land fraudulently through an instrument of transfer and subsequently granted a charge over the land to the defendant.

[61] Further, the learned trial judge relied on *Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors* [2014] 1 CLJ 987. The facts in that case can be distinguished with our present case. In *Kamarulzaman*, the first to the fourth respondents therein, from whom the fifth and sixth respondents obtained the title, were not immediate purchasers but were imposters who obtained a distribution order of the deceased's estate. Hence, the first to the fourth respondents never acquired any title to the land. There was no dealing, acquisition, transfer, purchase of any sort over the land as far as the first to the fourth respondents were concerned. Hence the *nemo dat* applies.

Unlike our case there was a transfer of the land to Nagarajan whereby he acquired a legal title (*albeit* fraudulently) through an instrument of transfer, before the execution of the legal charge.

[62] The plaintiff also raised the issue of the absence of consent by the State Authority in respect of the creation of the charge and hence submitted that the charge is invalid. It was in evidence at trial (and not disputed) that on 30 August 1986, the Director of Land and Mines Johor had provided a blanket consent which allowed registered proprietors of land (in this case Nagarajan) to provide or grant charges over the land to finance companies (the appellant) pursuant to Circular PTG Johor Bil. 10/1986.

[63] Thus, the defendant, as the chargee, is a *bona fide* acquirer of a subsequent interest in the land for valuable consideration and who had no notice of the alleged fraudulent transfer of the land to Nagarajan. The charge is indefeasible and the defendant is entitled to the protection by virtue of the proviso to s. 340(3) of the National Land Code.

[64] Based on the foregoing, we allowed the appeal. The order of the High Court was set aside with costs of RM10,000 subject to the payment of allocator upon extraction of the order. Deposit was to be refunded.